IN THE

Supreme Court of the United States

OCTOBER TERM, 1939. **No. 229**

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

JULY 24, 1939.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

INDEX.

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TO THE HONORABLE THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Real Estate-Land Title and Trust Company, petitioner herein, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the judgment of that court entered in this case on March 13, 1939, re-hearing denied May 1, 1939, and therefore shows as follows:

I. SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner is a corporation created by the merger of three other corporations, namely, the Real Estate Title Insurance and Trust Company, the Land Title and Trust Company, and the West End Trust Company, all of which formerly carried on business in the City of Philadelphia. The merger of these three companies became effective October 31, 1927, and the new corporation opened for business the following day. Negotiations for the said merger were first entered into by the Real Estate Title Insurance and Trust Company and the West End Trust Company, which companies agreed on a two-company merger. The Land Title and Trust Company was not considered as a party to the merger until the latter part of September, 1927, about two weeks before the merger agreement was signed (R. 421-22).

Before the above-mentioned merger two of the companies, viz., the Real Estate Title Insurance and Trust Company, and the Land Title and Trust Company, each owned a title plant used in its respective business of insuring titles to real estate. Both of these title plants were acquired by petitioner at the time of the merger. When the merger agreement was signed there was no definite plan for the use or disposition of the two title plants (R. 48). The Land Title and Trust Company came into the merger negotiations at such a late date that there was not time to give much consideration to the practical operation of the two plants, nor what disposition should be made of either or both of them (R. 48-49). It was the idea of the President of the new company that the plant of the Land Title and Trust Company should be used by the new company in carrying on its title business (R. 49). It was not until the negotiations for the merger had been completed, and the agreement signed by all three companies, that the question arose as to what would be done with the two title plants (R. 48).

An officer of The Land Title and Trust Company and

an officer of the Real Estate Title Insurance and Trust Company were appointed to examine into the situation. After their report was submitted it was decided that the new corporation (petitioner herein) should commence operations using the title plant of the Real Estate Title Insurance and Trust Company, and that the title plant of the Land Title and Trust Company should be stored and held in reserve (R. 49 and 423). It was not considered economical to keep both title plants up-to-date by daily additions thereto, until it was determined that both title plants would be needed in the business of the new corporation (R. 49-50).

The title plant of the Land Title and Trust Company was used in connection with Sheriff's sales occurring the first Monday of November, 1927, and other information was obtained from this plant and used by the petitioner for several weeks thereafter (R. 49-52). Within a couple of months after the merger it was definitely determined that the title plant formerly owned by the Real Estate Title Insurance and Trust Company would be sufficient for the purposes of petitioner's business, and at that time there was a virtual abandonment of the title plant formerly owned by the Land Title and Trust Company (R. 423-24).

The abandoned plant was in the market for sale and would have been sold had a reasonable offer been received. A price of $1,000,000 was quoted on it, but no offer in any amount was received (R. 50-51). No additions were made to this plant at any time after the merger, and as time went on the plant became more and more out of date due to the fact that it was not being kept up by daily additions thereto. During the first year after the merger it would have been necessary to enter in the records of this title plant, a record or notation of 227,498 documents to keep it up-to-date (R. 152). The dismantled title plant was stored in the basement of premises 517 Chestnut Street, where it was still housed at the time of the trial of this case (R. 51).

Petitioner brought suit against the United States in the District Court of the United States for the Eastern District of Pennsylvania, wherein petitioner claimed that in determining its net income subject to tax for the fiscal year ending October 31, 1928, it was entitled to a deduction in the amount of $1,250,000 due to the fact that the title insurance plant then owned by petitioner, but formerly owned by the Land Title and Trust Company, became obsolete and was abandoned during the said year, and claimed a refund of income tax for the said year in the amount of $153,125. This suit was started after petitioner's claim for refund had been disallowed by the Commissioner of Internal Revenue. The case was tried in the District Court on February 2nd and 3rd, 1937, by a Judge without a jury.

Petitioner proved at the trial that the title plant, formerly owned by The Land Title and Trust Company was not worth over $125,000 on October 31, 1928, a year after the merger, and that it had been worth a minimum of $1,000,000 on March 1, 1913 (R. 109, 111, 148 and 425). No depreciation or obsolescence had ever been claimed or allowed upon the said title plant from the time it was originally built by the Land Title and Trust Company up to the date of the merger.

The Trial Judge found that this title plant became obsolete prior to October 31, 1928, that petitioner had sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in the amount of $875,000 representing the difference between the fair market value of this title plant on March 1, 1913, and its value on October 31, 1928 (R. 424-425), and concluded that the petitioner was entitled to deduct this amount in determining its net taxable income for the fiscal year ending October 31, 1928 (R. 429).

Judgment was entered in the District Court in favor of petitioner and against the United States on March 31, 1937, in the amount of $107,270.71 with interest, representing the amount of the overpayment of income tax

by petitioner for the year in question, and from this judgment the United States appealed to the Circuit Court of Appeals for the Third Circuit.

The case was argued in the Circuit Court of Appeals on January 11, 1938, before Hon. J. Warren Davis and Hon. John Biggs, Jr., Circuit Judges, and Hon. Albert L. Watson, District Judge, and fourteen months later, to wit, on March 13, 1939, an opinion was filed by the Hon. John Biggs, Jr., reversing the judgment of the District Court. On the 11th day of April, 1939, a petition for rehearing was filed in the Circuit Court of Appeals, which petition was denied on May 1, 1939.

II. BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

(*a*) This Honorable Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Title 28 U. S. C. A. Section 347.

(*b*) The Statute of the United States involved in this proceeding is the Act of Congress known as the Revenue Act of 1928, approved May 29, 1928 (c. 852, 45 Stat. 795), the pertinent provisions of which are set forth in the Appendix to the Brief annexed hereto (pp. 43-45).

(*c*) The judgment of the Circuit Court of Appeals for the Third Circuit now sought to be reviewed was entered by the said Court on March 13, 1939 (R. 467). Petition for Rehearing was filed on April 11, 1939, within the time provided by the Rules of the said Circuit Court of Appeals (R. 468), and the said Petition for Rehearing was denied on May 1, 1939 (R. 485).

III. STATEMENT OF QUESTIONS PRESENTED.

1. Whether or not petitioner is entitled to a deduction for obsolescence of a title plant in determining net

income subject to Federal income tax for the fiscal year ending October 31, 1928.

2. Whether or not it was proper for the Circuit Court of Appeals in this case to direct the entry of a judgment contrary to the Findings of Fact and Conclusions of Law of the learned Trial Judge.

3. Whether under the claim for refund filed in this case, petitioner is entitled to a deduction on account of the abandonment of a title plant in determining net income subject to Federal income tax for the fiscal year ending October 31, 1928.

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals in the instant case has decided an important question of Federal law, namely, that where a title plant is not kept up-to-date by daily additions thereto, the plant is not the subject of obsolescence for purposes of Federal income tax. This decision by the Circuit Court of Appeals for the Third Circuit is in direct conflict with the holding of the Circuit Court of Appeals for the Eighth Circuit in the case of *Crooks, Collector*, v. *Kansas City Title and Trust Company*, 46 Fed. (2d) 928.

In the Crooks case the taxpayer acquired six abstract companies "each having an abstract plant." Four of these plants were found upon trial to be ineffective. There was evidence to the effect that some if not all of the books and indices of these four plants were discarded and stored in vaults. In 1921 the officers of the corporation determined that the said four plants would become obsolete within nine or ten years. The corporation claimed the right to deduct for income tax purposes annually from 1921 to 1930 a certain amount representing obsolescence of the said abstract plants. It appears that in that case the Collector advanced somewhat

similar arguments to those advanced by the United States in the instant case, namely, that when the taxpayer "bought the assets of the four companies it knew they were inefficient and of no use; that it did not intend to use them and did not use them; that it bought the useless to get the useful; that the evidence shows the books were not used in the company's business, and had no part in the production of revenue for any year; * * *" The Circuit Court of Appeals for the Eighth Circuit in the *Crooks* case held that the taxpayer was entitled to a deduction for obsolescence of the abstract plants which it had acquired and found ineffective.

It is submitted that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the *Crooks* case, as each of these courts had before it substantially the same question.

2. Petitioner herein respectfully submits that the United States Circuit Court of Appeals for the Third Circuit in reversing the judgment of the lower court in this proceeding, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, for the following reason:

The Trial Judge in the District Court filed very complete Findings of Fact and Conclusions of Law. He found as facts, *inter alia:*

(*a*) The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November, 1927 (Finding No. 15, R. 422).

(*b*) Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company (Finding No. 18, R. 423).

(c) After said investigation it was determined that plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger, and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Finding No. 19, R. 423).

(d) The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises No. 517 Chestnut Street, Philadelphia, Pa., and stored there during the latter part of October and early part of November, 1927 (Finding No. 20, R. 423).

(e) No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October, 1927. To keep the plant up-to-date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927, and ending October 31, 1928 (Finding No. 16, R. 422).

(f) About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company, which had been put in storage, would not be needed (Finding No. 21, R. 423-24).

(g) The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927, and ending October 31, 1928, and became obsolete on or before October 31, 1928 (Finding No. 24, R. 424).

(h) The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in an amount equal to the difference between the fair market value on March 1, 1913, of the title plant formerly owned by the Land Title and Trust

Company and the fair market value of the said title plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount of not less than $875,000 (testimony of Mecutchen, *supra*) (Finding No. 27, R. 425).

Notwithstanding the above findings, His Honor, Judge Biggs, of the Circuit Court of Appeals in his opinion stated:

> "To hold that the plant became obsolete within the taxable year is contrary to the facts. True, it was not as useful at the end of the taxable year as at its beginning, but to conclude that a title plant created between the years 1886 and 1887, steadily added to and kept up to date until October, 1927, loses its usefulness in the following twelve months because of a failure to add current notations to its records is contrary to reason. There is no adequate evidence of record in the case at bar to sustain such a view."

The learned Trial Judge had before him two credible witnesses of great experience in the operation and value of title plants, namely, Henry R. Robins, President of the Commonwealth Title Company of Philadelphia, and Pierce Mecutchen, Title Officer of the Land Title Bank and Trust Company, also of Philadelphia. These men are well known and have had vast experience in the title insurance business in the City of Philadelphia. They were subject to cross examination by counsel for the Government, and the findings of the Trial Judge were made after hearing their testimony both on direct and cross examination. There is ample evidence to support the findings of the Trial Judge.

The holding of the Circuit Court of Appeals is directly contrary to the findings of fact in the lower Court as set forth in paragraphs (*g*) and (*h*) above, and since there is ample evidence to support these findings,

it is submitted that this action by the Circuit Court of Appeals constitutes such departure from the accepted and usual course of judicial proceedings as to call for the exercise of supervision by this Honorable Court.

3. In his opinion His Honor, Judge Biggs, of the Circuit Court of Appeals, states, *inter alia:*

> "In our opinion the circumstances of the case at bar indicate the abandonment of a capital asset by the appellee."
>
> • • • • • • •
>
> "It is not necessary for us to pass upon the question of whether or not the deduction here sought might be available to the appellee upon the theory of the abandonment of a capital asset. The appellee cannot claim the deduction upon such a ground because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence."

The purpose of requiring the filing of a claim for refund is to inform the Commissioner of the basis of a taxpayer's claim and afford the Commissioner an opportunity of correcting errors made by his office. *Tucker* v. *Alexander,* 275 U. S. 228. In the instant case the Deputy Commissioner of Internal Revenue in his communication to the petitioner under date of February 11, 1931, advising petitioner that its claim for refund would be rejected, said in part as follows:

> "Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete *and was abandoned:*" (Italics ours).

This quotation shows clearly that the question of abandonment was considered by the Commissioner of

Internal Revenue in connection with petitioner's claim for refund.

Paragraph 22 of the petition filed in the District Court in this proceeding is as follows:

> "22. Petitioner avers that in determining its net income for the fiscal year ending October 31, 1928, it is entitled to a deduction in the amount of $1,250,000.00, due to the fact that the said title insurance plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned during the said year."

In its answer the United States denied that the plant had been abandoned, but did not question the right of the petitioner to a deduction on this theory if the court should determine that the plant had been abandoned; nor was this question raised by the Government at the trial of this case.

It is submitted that the claim for refund is sufficient for the allowance of the deduction claimed by petitioner, on the theory of either obsolescence or abandonment.

In holding that there was an abandonment of a capital asset in this case but that the petitioner cannot claim a deduction on this ground "because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence," the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise by this Honorable Court of its power of supervision.

WHEREFORE it is respectfully submitted that this petition for writ of certiorari to review the judgment

of the Circuit Court of Appeals for the Third Circuit should be granted.

And your petitioner will ever pray, etc.

THE REAL ESTATE-LAND TITLE AND TRUST COMPANY,

By

MAURICE BOWER SAUL,

Counsel for Petitioner.

JOSEPH A. LAMORELLE,
JOSEPH NEFF EWING,
SAUL, EWING, REMICK & SAUL,

Of Counsel.

Philadelphia, Pa.

Dated July 24, 1939.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The Opinion of the Circuit Court of Appeals is reported in 102 Fed. (2d) 582. It will be found on pages 459-466 of the Record. The Findings of Fact, Conclusions of Law, and the Opinion of the Trial Judge in the District Court will be found on pages 410 to 437 inclusive of the Record.

JURISDICTION.

1. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A. Section 347.

2. The judgment of the Circuit Court of Appeals was entered on March 13, 1939 (R. 467). Petition for rehearing was filed April 11, 1939, within the time provided by the Rules of the Circuit Court of Appeals (R. 468), and the petition for rehearing was denied on May 1, 1939 (R. 485).

3. The nature of the case, the rulings of the District Court and the Circuit Court of Appeals for the Third Circuit, and the reasons why a writ of certiorari should be granted, are set forth in the foregoing petition.

4. The grounds upon which the writ is asked are two of the reasons set forth in Rule 38 5(b) of the Rules of your Honorable Court as follows:

(*a*) The Circuit Court of Appeals for the Third Circuit has rendered a decision involving a Federal question, which decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Crooks* v. *Kansas City Title and Trust Company*, 46 Fed. (2d) 928, and

(*b*) The Circuit Court of Appeals for the Third Circuit in its decision in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise by this Honorable Court of its power of supervision.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

The petition for the writ of certiorari contains a statement of the case and of the questions involved, as well as a statement of the facts material to their consideration. In the interest of brevity the questions involved and material facts are not repeated here.

STATUTES INVOLVED.

The relevant provisions of the Revenue Act of 1928 (45 Stat. 795) are set forth in the Appendix hereto at pages 43-45.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in holding that the title plant of the Land Title and Trust Company could be operated effectively with approximately one-third the number of employees required to operate the plant formerly owned by the Real Estate Title Insurance and Trust Company.

2. The Circuit Court of Appeals erred in holding that there is no evidence to show that the title plant of the Land Title and Trust Company was used in connection with new searches of properties after October 31, 1927.

3. The Circuit Court of Appeals erred in holding that "the basis offered for obsolescence is really that of the duplication of property."

4. The Circuit Court of Appeals erred in holding that the loss claimed by the taxpayer cannot be brought within any established definition of obsolescence.

5. The Circuit Court of Appeals erred in holding that it is contrary to the facts to hold that the title plant formerly owned by the Land Title and Trust Company became obsolete within the taxable year.

6. The Circuit Court of Appeals erred in disregarding the findings of the District Court and in holding that it is contrary to reason to conclude that a title plant created between the years 1886 and 1887 and steadily added to and kept up-to-date until October 1927, loses its usefulness in the following twelve months because of the failure to add current notations to its records, and that there is no adequate evidence of record in the case at bar to sustain such a view.

7. The Circuit Court of Appeals erred in holding that the deterioration suffered by the title plant in the period from November 1, 1927 to October 31, 1928, was physical deterioration and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Company *v.* United States, 284 U. S. 511.

8. The Circuit Court of Appeals erred in holding that obsolescence cannot be maintained upon the basis claimed in the case at bar.

9. The Circuit Court of Appeals erred in holding that the taxpayer is not entitled to the deduction claimed in this proceeding on the theory of abandonment because the claim for refund by taxpayer "was asserted by it solely upon the ground of obsolescence."

10. The Circuit Court of Appeals erred in holding that the amount of deduction allowed to the taxpayer by the District Court was not supported by the evidence.

11. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

12. The Circuit Court of Appeals erred in directing the entry of a judgment for the respondent.

13. The Circuit Court of Appeals erred in entering the following judgment:

> "The judgment of the court below is reversed and the cause is remanded with the direction to enter judgment in favor of the defendant-appellant."

ARGUMENT.

We will discuss the legal questions involved in this proceeding under the following headings:

1. A Title Plant is Properly Subject to Obsolescence and the Decision of the Circuit Court of Appeals for the Third Circuit in This Case is in Direct Conflict With the Decision of the Circuit Court of Appeals for the Eighth Circuit in the Case of Crooks, Collector, v. Kansas City Title and Trust Company, 46 Fed. (2d) 928.

2. There is Ample Evidence to Sustain the Findings of Fact of the Trial Judge.

3. The Findings of Fact of the Trial Judge are Conclusive, and Fully Sustain His Conclusions of Law.

4. The Petitioner is Clearly Entitled to a Deduction Because of the Abandonment of a Capital Asset.

1. A Title Plant is Properly Subject to Obsolescence, and the Decision of the Circuit Court of Appeals for the Third Circuit in This Case is in Direct Conflict With the Decision of the Circuit Court of Appeals for the Eighth Circuit in the Case of Crooks, Collector, v. Kansas City Title and Trust Company, 46 Fed. (2d) 928.

From the evidence it is clear that the title plant formerly owned by the Land Title and Trust Company was not kept up-to-date by daily additions thereto after October 31, 1927.

Judge Biggs, of the Circuit Court of Appeals, in his opinion states:

> "Moreover, we think that in a true sense the deterioration suffered by the plant in the period from November 1, 1927, to October 31, 1928, was physical deterioration, and as such may not be claimed as obsolescence within the definition set forth in United States Cartridge Co. *v.* United States, *supra.* The loss suffered by the appellee within the taxable year is more closely allied to depreciation, which, continued from year to year thereafter, might result upon some future date in a complete loss of value in the plant."

From the above holding it is clear that Judge Biggs is of the opinion that there was certain deterioration suffered by the title plant during the period November 1, 1927, to October 31, 1928, but that such deterioration may not be claimed as obsolescence. Judge Biggs admits that there was a loss suffered by the taxpayer within the taxable year, but states that such loss is more closely allied to depreciation.

It is submitted that the holding by the Circuit Court of Appeals in this case is in direct conflict with the holding of the Circuit Court of Appeals for the Eighth Circuit, in *Crooks, Collector,* v. *Kansas City Title and Trust Company, supra, wherein it was held that abstract plants acquired by the taxpayer and not kept up-to-date because found upon trial to be inefficient, were the proper subjects of obsolescence.* In the opinion of Judge Kenyon in the *Crooks* case we find the following (p. 929):

> "The real complaint of appellant is that notwithstanding complete obsolescence in 1930 was deter-

mined in 1920, under this record the amount to be set aside for such obsolescence is impossible of determination and that the court's allowance is wrong. As a jury was waived in writing we are limited to the questions as to whether there was substantial evidence to sustain the findings of fact and whether they support the judgment."

* * * * * * *

"The deduction under the law is a reasonable allowance for exhaustion, wear and tear of property used in the business, including a reasonable allowance for obsolescence. Revenue Act 1921, c. 136, sec. 234(a), 42 Stat. 227, 256."

"The Treasury Department through the Bureau of Internal Revenue has laid down the rule as to obsolescence of abstract plants under section 234(a), c. 136, 42 Stat. 227, 256, in a ruling as follows:

> "'The cost of an abstract plant, found upon trial to be inefficient and to which additions were not made in order to keep it up-to-date, may be recovered through depreciation or obsolescence allowances.'

"The opinion as set forth in I. T. 1775 Internal Revenue Cumulative Bulletin is as follows:

> "'In 1921 the taxpayer purchased the abstract plant of the M. Company. At the time this plant was purchased it was thought it could be used to advantage in the abstract and title guaranty work of the taxpayer but was found upon trial to be inefficient and the records in part a duplication of the records of the taxpayer. It was then decided not to continue additions thereto from day to day in order to keep it up-to-date.
>
> "'Advice is requested as to whether the taxpayer may take as a deduction depreciation sustained to the plant in view of the fact that it has

not been added to or kept up-to-date since its purchase.

"'Held, that it is a proper case for depreciation or obsolescence allowances and the cost of the plant less the salvage value thereof should be spread equally over the period from the date the permanent abandonment of the plant was foreseen to the date of the permanent abandonment and deductions allowed each year in such amounts for income tax purposes.'"

* * * * * * *

"There was substantial evidence to sustain the findings of fact by the court, and the conclusions of law are amply supported by such findings. The judgment is affirmed."

It is submitted that the question as to whether or not a title plant which is not kept up-to-date by daily additions thereto can be the subject of an allowance for obsolescence, is an important question of Federal law, and since there are conflicting decisions in two circuits, the question should be reviewed and definitely decided by this Honorable Court.

2. THERE IS AMPLE EVIDENCE TO SUSTAIN THE FINDINGS OF FACT OF THE TRIAL JUDGE.

The learned Trial Judge filed, *inter alia*, the following Findings of Fact:

(*a*) The title plant formerly owned by the Land Title and Trust Company was used in the business of the plaintiff-petitioner after the merger in November of 1927 (Finding No. 15, R. 422).

(*b*) Upon investigation it was learned that the Real Estate Title Insurance and Trust Company's title plant was being operated by 43 employees while 124 employees were required to operate the title plant of the Land Title and Trust Company (Finding No. 18, R. 423).

(*c*) After said investigation it was determined that plaintiff-petitioner would try out the title plant of the Real Estate Title Insurance and Trust Company upon commencement of business after the merger, and that the title plant of the Land Title and Trust Company would be stored and held in reserve (Finding No. 19, R. 423).

(*d*) The said title plant formerly owned by the Land Title and Trust Company was moved to the basement of premises No. 517 Chestnut Street, Philadelphia, Pa., and stored there during the latter part of October and early part of November, 1927 (Finding No. 20, R. 423).

(*e*) No entries were made in the title plant formerly owned by the Land Title and Trust Company after the latter part of October, 1927. To keep the plant up-to-date, it would have been necessary to make a total of 227,498 entries for the plaintiff's fiscal year beginning November 1, 1927, and ending October 31, 1928 (Finding No. 16, R. 422).

(*f*) About two months after the merger, it was decided that the title plant formerly owned by the Real Estate Title Insurance and Trust Company was adequate for the purposes of the plaintiff-petitioner and that the title plant formerly owned by the Land Title and Trust Company, which had been put in storage, would not be needed (Finding No. 21, R. 423-24).

In support of the above Findings we respectfully refer to the testimony of J. Willison Smith, President of the petitioner, wherein the following appears (R. 49, 50, 51 and 52):

> "Mr. Bonsall was requested to take up the subject and make a report, which he did, in the latter part of October, toward the end of October, 1927. I don't recall definitely who worked with Mr. Bonsall, but I think Mr. Mecutchen, who was the title officer, worked with Mr. Bonsall on that report, and they studied the situation with the Real Estate Title

officers (Tr. 21-22). The report was that from the practical standpoint, and an economical standpoint, the Real Estate Title plant should be tested out and determine whether the economy would make it worth while to continue that plant and not use—until that trial period was over—anything in the way of the Land Title plant. The Land Title plant had to be used for a very short time in part on account of the time element with respect to Sheriff's sales of the coming month, the month of November, and I think December, although I can't say definitely on that. Economy of operation of the Real Estate Title plant was so convincing that it was definitely determined later that the plant of the Real Estate Title should be the working plant. The plant of the Land Title had been placed in the basement of 517 Chestnut Street, which was the old office of the Real Estate Title Insurance and Trust Company, and now the downtown office of the Land Title Bank and Trust Company.

"We did not keep the Land Title plant up-to-date. It was allowed to run down, as far as keeping it up to the daily records, and judgments and plans and abstracts from the daily records, and so forth (Tr. 23).

"Q. At what time did you start to allow the Land Title plant to go down?

"A. Well, my recollection was about the time of the latter part of October, about that time. But parts of the Land Title plant were used during the early part of November, as I recall it, of 1927, to take care of some situations which were necessary at that particular time of the month.

"Q. In other words, I understood that you testified that they continued to use it, but did they continue to keep up the records in it?

"A. No, they did not.

"Q. From sometime, you say, in the latter part of October?

"A. That is correct" (R. 49-50).

• • • • • • •

"Q. What was the ultimate disposition of that plant?

"A. It is still there without use, without practically any use.

"Q. When did you cease to use it?

"A. I don't believe that plant has been used—of course I did not actually physically handle the situation, but to the best of my recollection it hasn't been used since 1928, early part of 1928" (R. 51-52).

The testimony of Mr. Mecutchen is in part as follows (R. 74, 76, 83 and 84):

"Q. Mr. Smith testified that Mr. Bonsall and Mr. Cowdrick took up the question of which of the two title plants would be used by the new company. Were you associated with Mr. Bonsall in that work?

"A. I went around with him and Mr. Cowdrick. We were shown the various operations that went on in the Real Estate Title plant and the character of its conditions; Mr. Cowdrick asking some questions that were asked by us, particularly by Mr. Bonsall. And it was after that it was concluded to try out the Real Estate Title plant as being the preferable one to use from the standpoint of economy and probably also from the standpoint of speed" (R. 74).

• • • • • • • •

"Q. Then I understand you came to the conclusion to use the Real Estate Title plant on account of economy of operation?

"A. Yes, sir; that is true.

"Q. And what happened to the Land Title plant?

"A. The Land Title plant was taken down to 517 Chestnut Street, and the larger part of it was stored in the basement, some portions of it were kept elsewhere. I think the block plan books were not stored in the basement, but everything else of any importance, that I know of, was stored down there" (R. 76).

* * * * * * *

"Q. And what happened to them after they were put there? Were they used or not?

"A. The only use made of them in October, that I know of, was that the block plan books, which were sent down first, were used as a means of ascertaining what insurances were involved in connection with the forthcoming Sheriff sales of November, it having been the custom to look at such insurances to make sure that the Sheriff sales were not upon any liens which affected the title as of the date that we had insurance—to any such properties. And outside of that I have no personal knowledge of what reference may have been made, from time to time, after the first of November, when the new company went into operation, what references may have been made from time to time to that plant (Tr. 66).

"Q. You do know that they looked up some things from time to time?

"A. But I believe, from time to time, there has been, very occasionally, a check-up of some information from material in the plant to save a visit to City Hall.

"Q. Did they increase or decrease after the plant was stored there?

"A. I think that it decreased as the time went by, so that there was practically little or no use made of it by the end of the year following the merger" (R. 83-84).

Mr. Mecutchen testified that the number of entries which would have been made in the title plant of the Land Title and Trust Company for the year beginning November 1, 1927, and ending October 31, 1928, had the said title plant been kept up-to-date during that period, would have totaled 227,498 as follows (R. 151-152):

> "From November 1st, 1927 to October 31st, 1928, inclusive, there were 54,419 mortgages; 62,710 deeds, 19,963 assignments; 2,031 releases; 38,207 judgments; 47,075 liens, including more particularly mechanics and municipal claims; and United States District Court judgments, 1,944; and bankruptcies, 1,149."

The learned Trial Judge also found as follows:

(*g*) The said title plant formerly owned by the Land Title and Trust Company was the subject of obsolescence during the plaintiff's fiscal year commencing November 1, 1927, and ending October 31, 1928, and became obsolete on or before October 31, 1928 (Finding No. 24, R. 424).

The above finding is supported by the following testimony of Henry R. Robins, President of the Commonwealth Title Company of Philadelphia (R. 113-114, and 139-140):

> "Q. Let me ask you to say what the difference was in the plant after it had been taken out of use in October, 1927, and stored in the basement, 517 Chestnut Street—what would the difference be in the plant by October 31, 1928? (Tr. 105.)
>
> "THE WITNESS:—It would have a continuous depreciation from October 31, 1927, down to 1928; that depreciation rapidly increasing as time went on. In the early part of 1928 the depreciation of the value of that plant would not be so great as at the end of the year, and as you got near the end of the

year it would go down at a greater rate. So it would be pretty nearly valueless at the end of the year, for the expense of bringing it up to date would have been so great that no one would have thought—no sane man in business would have thought of buying that plant and going to the expense of bringing it up to date.

"By Mr. Ewing:

"Q. That is a year after it had been stored?

"A. A year after it had been stored. In the early part of the year the expense of bringing it up to date would not have been so great.

"Q. What other elements do you take at fixing the value as of October 31, 1928, beside the cost of bringing the plant up to date?

"A. The question of marketability.

"Q. How would that be affected?

"A. Why, greatly. Any asset of any kind which is discarded, allowed to deteriorate, and then attempted to be sold as a second-hand used article, depreciates in value; and the title plant does, in the same way, the same as the ordinary" (R. 113-114).

* * * * * * * *

"Q. Well now, what effect, as far as the value of the plant is concerned, taking it out of use and storing it down in the basement, would it have on the plant?

"A. It would deteriorate most rapidly (Tr. 135, 136).

"Q. You testified it would deteriorate from not being kept up. Would that have any other effect on possible purchasers of the plant?

"A. It certainly would. Possibly a purchaser of anything in the way of a second-hand article is going to figure, as Mr. Mecutchen brought out, what it is going to cost to bring it up. It is a second-hand article. He can go and buy a cheaper new article of a modern make that will answer his purpose just as

well, and he is not going to buy a second-hand article that he has got to spend money on, if he can buy something else that answers his purpose, cheaper, and is not anything as good.

"Q. And was it known the reason this was discarded for The Real Estate-Land Title plant was on account of its high cost of operation?

"A. Yes. Throughout all title circles of Philadelphia where there was a possible market for this plant everyone knew that the Land Title's plant had been discarded and the Real Estate Title plant was the one that was going to be used.

"Q. And they knew the reason for it?

"A. Every title company in town knew it, and every company in town knew the reason why, on account of the expensive mode of operation. It was discussed at title meetings; representatives of title companies talked it over" (R. 139-140).

The learned Trial Judge also found as follows:

(*h*) The plaintiff-petitioner sustained a loss during its fiscal year commencing November 1, 1927, and ending October 31, 1928, in an amount equal to the difference between the fair market value on March 1, 1913, of the title plant formerly owned by the Land Title and Trust Company and the fair market value of the said title plant on October 31, 1928. The plaintiff-petitioner sustained a loss in said taxable year in an amount of not less than $875,000 (testimony of Mecutchen, *supra*) (Finding No. 27, R. 425).

In Mr. Mecutchen's testimony we find the following (R. 148):

"Q. You were familiar, of course, in your testimony yesterday, with the plant of the Land Title and Trust Company, where you were working on March 1st, 1913?

"A. Yes (Tr. 147).

"Q. What, in your opinion, was the fair value of that title plant at that time?

"A. I think it was worth, in my opinion, a million dollars.

"Q. And you were equally familiar with the plant on October 31, 1928, a year after the merger? What in your opinion—your answer to that is yes?

"A. Yes, that is true.

"Q. What, in your opinion, was the fair value of the plant at that time?

"A. Not over a hundred to $125,000."

In this connection Mr. Robins testified as follows (R. 109 and 111):

"Q. What, in your opinion, was the fair value of the plant of that title plant on March 1st, 1913?

"THE WITNESS:—March 1st, 1913, I would say I am of the opinion that the title plant of the Land Title and Trust Company was worth one million and a quarter dollars" (R. 109).

* * * * * * *

"Q. I am asking you now, under the conditions which you heard testified to yesterday by Mr. Mecutchen, what, in your opinion, was the fair value of that plant as it was a year after the merger in October 31, 1928?

"A. It was worth just about what you could get for it. I would not believe you could have gotten over $100,000 at the outside.

"Q. Then, in your opinion, the outside fair value of the plant on October 31, 1928, would be $100,000?

"A. About $100,000. Somewhere between fifty and a hundred. You couldn't find a purchaser for that" (R. 111).

It is submitted that the foregoing quotations from the Record in this case clearly prove that there was ample testimony to support the findings of the Trial Judge.

3. THE FINDINGS OF FACT OF THE TRIAL JUDGE ARE CONCLUSIVE, AND FULLY SUSTAIN HIS CONCLUSIONS OF LAW.

This proceeding was instituted under the Tucker Act, which in Section 7 thereof (28 U. S. C. A. Section 764) provides in part as follows:

> "It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon."

The Findings of Fact, Conclusions of Law, and the Opinion of the Trial Judge are set forth at length on pages 410 to 437 inclusive of the Record.

It is clear from the argument under the preceding heading that there is ample evidence to support the Findings of the Trial Judge, *and since this is so the Findings of the Trial Judge are conclusive.* The only remaining question then is whether or not the Conclusions of Law of the Trial Judge are supported by his Findings of Fact.

In *United States* v. *Buffalo Pitts Company*, 234 U. S. 228 (1914), a proceeding instituted under the Tucker Act in which this question arose, Mr. Justice Day in his opinion stated, at 232:

> "In cases brought under this act coming up from a District or Circuit Court of the United States *the findings of fact of the trial court are conclusive*, and the question is whether the conclusions of law were warranted by the facts found (*Chase* v. *United States*, 155 U. S. 489, 500). Exceptions to the rule may exist if the record enables the court to conclude that the ultimate facts found are not supported by any evidence whatever (*Collier* v. *United States*, 173 U. S. 79)." (Italics ours.)

In *Chase* v. *The United States*, 155 U. S. 489 (1894), Mr. Justice Harlan stated in his opinion, at page 500:

> "But under that Act [the Tucker Act] a judgment of a District or Circuit Court of the United States in an action at law brought against the Government, will be re-examined here only when the record contains a specific finding of facts with the conclusions of law thereon. In such cases, this Court will only inquire whether the judgment below is supported by the facts thus found."

See also *Wessel, et al.* v. *United States*, 49 Fed. (2d) 137 (C. C. A. 8th Cir. 1931), and *United States* v. *Union Trust Co. of Indianapolis, et al.*, 90 Fed. (2d) 702 (C. C. A. 7th Cir. 1937), both of which arose under the Tucker Act and involved claims for refund of tax.

In the *Wessel* case Judge Kenyon in his opinion states (p. 139):

> "The special findings of fact by the trial court have the same effect as the verdict of a jury. Cramp *v.* United States, 239 U. S. 221, 36 S. Ct. 70, 60 L. Ed. 238; Crocker v. United States, 240 U. S. 74, 36 S. Ct. 245, 60 L. Ed. 533; Brothers *v.* United States, 250 U. S. 88, 39 S. Ct. 426, 63 L. Ed. 859; Stone *v.* United States, 164 U. S. 380, 17 S. Ct. 71, 41 L. Ed. 477."

In the *Union Trust Company* case Judge Major in his opinion states (p. 703):

> "It is not the province of this court to weigh the evidence or analyze the same except to the extent of ascertaining if the ultimate fact found by the trial court is supported by *any* evidence." (Italics ours.)

And again (p. 703):

> "While there is evidence in the record inconsistent with such ultimate finding by the trial court and

evidence from which a contrary conclusion might be reached, yet there is evidence which supports it. The testimony of Mrs. Atwater with reference to the gift, corroborated to some extent by Mrs. Roach, substantially justifies the finding of the trial court in the respect indicated."

In this connection attention is called to Rule 52 (a) of the new Federal Rules of Civil Procedure entitled, "Findings by the Court," which rule is in part as follows:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Section 23 of the Act of Congress approved May 29, 1928 (45 Stat. 795), known as the Revenue Act of 1928, provides in part as follows:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

• • • • • • •

(k) DEPRECIATION. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. • • •"

The provisions of the above quoted section of the Revenue Act of 1928 when applied to the Findings of Fact set forth under the preceding heading of this brief, clearly support the following Conclusions of Law made by the learned Trial Judge:

"6. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal

year commencing November 1, 1927 and ending October 31, 1928 the loss sustained by it during said taxable year due to the abandonment of the title plant formerly owned by the Land Title and Trust Company" (R. 428).

"7. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 a reasonable allowance for obsolescence to the title plant formerly owned by the Land Title and Trust Company" (R. 429).

"8. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 the difference between the fair market value on March 1, 1913 of the title plant formerly owned by the Land Title and Trust Company and its fair market value on October 31, 1928" (R. 429).

"9. The plaintiff-petitioner is entitled to deduct from its net taxable income, as determined by the Commissioner of Internal Revenue, for its fiscal year commencing November 1, 1927 and ending October 31, 1928 an amount not less than $875,000" (R. 429).

His Honor, Judge Biggs, in the Circuit Court of Appeals in the instant case said, *inter alia:*

"To hold that the plant became obsolete within the taxable year is contrary to the facts. True, it was not as useful at the end of the taxable year as at its beginning, but to conclude that a title plant created between the years 1886 and 1887, steadily added to and kept up to date until October, 1927, loses its usefulness in the following twelve months because of a failure to add current notations to its

records is contrary to reason. There is no adequate evidence of record in the case at bar to sustain such a view."

It is submitted that the above holding of Judge Biggs is contrary to the Findings of Fact and Conclusions of Law of the learned Trial Judge, and since there is ample evidence to sustain the findings of the Trial Judge and his findings in turn support his Conclusions of Law, it was clearly error for the Circuit Court of Appeals to reverse the judgment based upon these findings and conclusions. It is therefore submitted that this Honorable Court should exercise its power of supervision and reverse the judgment of the Circuit Court of Appeals.

4. The Petitioner is Clearly Entitled to a Deduction Because of the Abandonment of a Capital Asset.

On pages 8 and 9 of his opinion, Judge Biggs states:

"In our opinion the circumstances of the case at bar indicate the abandonment of a capital asset by the appellee."

* * * * * * * *

"It is not necessary for us to pass upon the question of whether or not the deduction here sought might be available to the appellee upon the theory of the abandonment of a capital asset. The appellee cannot claim the deduction upon such a ground because it appears that the claim for refund asserted by the appellee was asserted by it solely upon the ground of obsolescence."

The purpose of requiring the filing of a claim for refund is to inform the Commissioner of the basis of the taxpayer's claim and to afford him an opportunity of correcting errors made by his office.

On this point Mr. Justice Stone in his opinion in *Tucker* v. *Alexander*, 275 U. S. 228, states (page 231):

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial."

In *Wunderle* v. *McCaughn*, 38 Fed. (2d) 258, Judge Kirkpatrick in his opinion states (page 260):

> "The requirement of the statute (26 U. S. C. A. sec. 156) is 'a claim for refund or credit * * * according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *' The regulations in force require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath.' In Tucker *v.* Alexander, 275 U. S. 228, 48 S. Ct. 45, 72 L. Ed. 253, the Supreme Court said: 'The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial.' In the opinion of the lower court in the same case (reversed upon the question of waiver, but not disapproved upon the point here involved) it was pointed out that the principal purpose of the condition was to afford the Commissioner an opportunity to correct errors made by his office."

In the case at bar we respectfully refer the Court to the communication from the Deputy Commissioner of Internal Revenue dated February 11, 1931, advising petitioner that its claim for refund would be rejected, in which communication the Deputy Commissioner states (Record, pages 19 and 20):

"Your claim is based on the statement that the title plant formerly owned by the Land Title and Trust Company became obsolete *and was abandoned;*" (Italics ours).

The above quotation clearly shows that the question of *abandonment* was submitted to the Commissioner of Internal Revenue by your petitioner in support of its claim.

In *Warner* v. *Walsh*, 24 Fed. (2d) 449, the claim for refund was filed on the theory that the amount received by the taxpayer from the estate of her deceased husband was a bequest or a legacy, and therefore not subject to income tax. The court held the income not subject to tax on the theory that the widow by giving up her statutory rights in the estate was purchasing an annuity. The question was raised that this theory had not been advanced in the claim for refund, and on this point Judge Thomas in his opinion states (p. 450):

"The second ground is that, in the claim presented to the Commissioner of Internal Revenue for a refund, 'the alleged purchase for value theory' was not set out as a ground for such refund. I regard the claim as untenable. In Union & New Haven Trust Co. *v.* Eaton, Collector, 20 F. (2d) 419, decided by this court on June 2, 1927, it was held that a plaintiff, suing for a refund, is not barred from setting up a ground for relief which was not specified in his claim for refund. There this court said: 'To hold, therefore, that a plaintiff is precluded from asserting a reason * * * not advanced in his notice of claim, is to read a condition into the statute not legislated by Congress.'

"Assuming, however, that the facts upon which a claim for refund is predicated must be incorporated in the notice of claim, and assuming that the plaintiff is precluded from setting up any further facts in her

complaint, I cannot find that the notice of claim filed in the case at bar is deficient. The Commissioner is therein apprized of all of the material facts. It is true that the *theory* of the relief is not set out. But the theory of a claim for relief is something separate and apart from the facts, and the same set of facts may, and often does, give rise to differing theories. To say that an argument may not be advanced in this court which was not elaborated in the notice of claim before the Commissioner is unwarranted by the language and intent of the statute under consideration."

In *Warner* v. *Walsh*, 27 Fed. (2d) 952, on this same point Judge Burrows in his opinion states (page 953):

"The defendant's second claim is that the taxpayer never presented in writing to the Commissioner of Internal Revenue the 'alleged purchase for value theory' as a ground for her claim for refund, and therefore the claim for refund was never properly presented, or considered within the meaning of the statutes, and hence this action will not lie. This claim was made to the court in the previous case of Warner *v.* Walsh (D. C.) 24 F. (2d) 449, and in the case of Union & New Haven Trust Co. *v.* Eaton, Collector (D. C.) 20 F. (2d) 419, and in both cases, Judge Thomas held this claim untenable, and I concur in this view."

In *Wunderle* v. *McCaughn, supra*, Judge Kirkpatrick, of the same court in which the case at bar was tried, said in his opinion at page 260:

"I am of the opinion that where, as in this case, the deduction of a specific item of credit claimed but subsequently disallowed by the Commissioner is the basis of the claim, a claim for refund, setting forth fully and in detail all the facts and circumstances giv-

ing rise to the claim, is a sufficient compliance with the statute, and, further, that the fact that an erroneous legal theory is presented, or, more specifically, that the deduction is claimed as a bad debt when it is really something else, does not destroy the legal sufficiency of the claim for refund."

* * * * * * *

"I am in accord with the view expressed in Warner *v.* Walsh (D. C.) 24 F. (2d) 449, and the opinion of Union & New Haven Trust Co. *v.* Eaton (D. C.) 20 F. (2d) 419, that, where the Commissioner is apprised of all the material facts, it is immaterial that the theory on which relief is asked is not set out. Nor, I think, is it material that the wrong theory is set out. That is particularly true in a case like this in which the claim involves a narrow and sharply defined issue."

In *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 Fed. (2d) 459, Judge Kirkpatrick again said (page 460):

"*No copy of the claim for refund is attached to the statement.* The statement of claim does allege that 'plaintiff duly filed with defendant claim for refund in the sum of $11,854.79.' and that the claim was rejected, and at the argument a motion to amend the statement by attaching a copy was made and the amendment allowed. *An inspection of the paper shows that it does not include the claim now made.* However, a copy of the notice of rejection from the Commissioner of Internal Revenue is attached to the statement, which contains the following:

"'Mortgages, Notes, Cash, and Insurance.	Returned.	Determined.	Adjusted.
Equitable Life Assurance Society policy	$101,000	$101,000	$101,000

"'It is contended by the estate that the ruling of the bureau in including in the decedent's gross estate all of the above insurance is erroneous. A further review has been made by this office in connection with the above protest, careful consideration being given to the brief submitted by the estate on the question involved. The bureau is, however, unable to change its former ruling, arrived at as the result of the conference held in this office, and therefore the determination, as shown in the closing letter, will be adhered to. *Your claim in connection with this question is, therefore, rejected.*'" (Italics ours.)

After quoting from the notice from the Commissioner of Internal Revenue, rejecting taxpayer's claim in the *Union Trust Co.* case as above set forth, Judge Kirkpatrick in his opinion continues (p. 461):

"From this it appears that the matter of the inclusion of the life insurance policy in the decedent's gross estate, which is the basis of this suit, was presented to the Commissioner, and that it was considered and rejected by him. As stated in the opinion in Tucker *v.* Alexander, *supra*: 'The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto.'

"(3) *If these objects have been attained, the statute has been sufficiently complied with, even though some of the grounds upon which the claim was made were not specifically set forth in the application. It is apparent from the letter of the Commissioner that he had before him the question now raised, and that he had full opportunity to reconsider and modify the ruling of his office, had he deemed the ruling erroneous. He also, of course, had the right to waive any defect or informality in the application for refund, and, in view*

> *of his letter, he will be held to have done so.* I am therefore of the opinion that, so far as this requirement of the statute is concerned, the statement sets out a sufficient cause of action." (Italics ours.)

The situation in the case at bar is analogous to that in the *Union Trust Co.* case, *supra,* in that in the case at bar the letter from the Deputy Commissioner advising that petitioner's claim would be rejected (R. 19-20) clearly shows that the Commissioner considered the question of abandonment.

Paragraph 22 of the petition filed in the District Court in this proceeding is as follows:

> "22. Petitioner avers that in determining its net income for the fiscal year ending October 31, 1928, it is entitled to a deduction in the amount of $1,250,000.00, due to the fact that the said title insurance plant formerly owned by the Land Title and Trust Company became obsolete and was abandoned during the said year."

In its answer the defendant denied that the plant had been abandoned, but did not question the right of the petitioner to a deduction on this theory if the Court should determine that the plant had been abandoned.

Nor was this question raised by the Government at the trial of this case.

It is submitted that the claim for refund is sufficient for the allowance of the deduction claimed by petitioner, either on the theory of obsolescence or abandonment.

If there is a variance between the grounds alleged in the claim for refund and the grounds alleged in the petition filed in the District Court, which we do not admit, the Government can waive any right it may have to raise this question, and it is submitted that by not raising it either in its answer or in the District Court, the Government has waived this right.

In *Tucker* v. *Alexander*, 275 U. S. 228, the taxpayer was the owner of shares of stock in a corporation which was dissolved and liquidated during the year 1920. A distribution of some portion of the corporation's assets had been made to stockholders in May of 1913. On the dissolution the Commissioner of Internal Revenue taxed as income the difference between the value of the property received by taxpayer as a liquidating dividend, and the value of his stock on March 1, 1913 less the value of the distribution made in May of 1913, which distribution was treated as a return of capital.

Taxpayer paid the tax under protest, and filed a claim for refund assigning as reasons for his claim, (1) the Commissioner's erroneous computation of the March 1, 1913 value of the stock, and (2) the Commissioner's failure to deduct from the capital and surplus of the company at the date of liquidation the amount of certain outstanding debts which were assumed by the stockholders.

There was no explicit statement made in the claim for refund that the Commissioner had erred in decreasing the March 1, 1913 value by the value of the property distributed in May, 1913, nor was that point raised by the petition filed in the District Court, which in effect merely repeated the allegations of the claim for refund.

In the course of the trial taxpayer, without objection by the Government, abandoned the grounds of recovery stated in the petition and attacked only the action of the Commissioner in deducting from the March 1, 1913 value, the value of the distribution made in May of 1913. This was apparently a question as to whether the distribution of May, 1913, was a return of capital, or the distribution of a dividend. That issue alone was litigated. At the close of the trial counsel stipulated that if the court found the deduction to have been erroneously made, the taxpayer should have judgment in a sum named. The judgment entered against taxpayer in the District Court

was affirmed by the Court of Appeals for the Eighth Circuit (15 Fed. (2d) 356) *in an opinion holding that a recovery on grounds different from those set up in the claim for refund was precluded by Section 3226 of the Revised Statutes, as amended.*

Mr. Justice Stone, of the Supreme Court of the United States, *in reversing the judgment and holding that the taxpayer was not precluded from recovering* in that case, said (pages 230, 231):

> "In our view of the case, the question considered by the circuit court of appeals was not properly before it, and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913. All other questions were taken out of the case by stipulation.
>
> "If the Collector and counsel for the government had power to waive an objection to the sufficiency of the description of the claim filed, it was waived here, and we need not consider the precise extent of the requirements prescribed by statute and regulations, nor whether petitioner's claim for refund fell short of satisfying them. The Solicitor General does not urge that the government's possible objection could not be waived but submits the question for our decision.
>
> "Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Kings County Savings Institution* v. *Blair*, 116 U. S. 200; *Maryland Casualty Co.* v. *United States*, 251 U: S. 342, 353, 354; *Nichols* v. *United States*, 7 Wall. 122, 130. But no case appears to have held that such objections as that urged here

may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

See also *Union Trust Company of Pittsburgh* v. *McCaughn*, 24 Fed. (2d) 459.

There is no question but that petitioner herein sustained a substantial loss in that during the taxable year in question a title plant owned by petitioner lost a very large part of its value, and it would seem therefore that the petitioner is entitled to a deduction for this loss whether it be considered that the loss was sustained through obsolescence or abandonment. In either event it is a loss in connection with a title plant.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of *certiorari* should be granted as prayed for.

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JULY 24, 1939.

APPENDIX.

STATUTES INVOLVED.

The law applicable to this case is the Act of Congress approved May 29, 1928 (45 Stat. 795) known as the Revenue Act of 1928. The pertinent provisions of this statute are as follows:

"**Section 1. Application of Title**

The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years.

§ 48. Definitions

When used in this title—

(a) Taxable Year. 'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1928, shall be the calendar year 1928 or any fiscal year ending during the calendar year 1928.

(b) Fiscal Year. 'Fiscal year' means an accounting period of twelve months ending on the last day of any month other than December.

§ 23. Deductions from Gross Income

In computing net income there shall be allowed as deductions:

* * * * * * *

(f) Losses by Corporations. In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

(g) Basis for Determining Loss. The basis for

determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property.

* * * * * * *

(k) Depreciation. A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

* * * * * * *

(m) Basis for Depreciation and Depletion. The basis upon which depletion, exhaustion, wear and tear and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

§ 114. Basis for Depreciation and Depletion

(a) Basis for Depreciation. The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property.

§ 113. Basis for Determining Gain or Loss

(a) Property Acquired After February 28, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(7) Transfers to corporation where control of property remains in same persons. If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same

persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

* * * * * * * *

(b) Property Acquired before March 1, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913 shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided, or

(2) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

§ 112. Recognition of Gain or Loss

(b) (4) Same—Gain of corporation. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."

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